

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1904.

No. 1398.

No. 18, SPECIAL CALENDAR.

FANNIE B. COLONNA, LORENZO A. BAILEY, KATHLEEN
ALTON SAWYER, AND MINNIE ALTON BAILEY,
APPELLANTS,

vs.

EDMUND ALTON AND ALTON HORACE BAILEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Will and testament of Eileen A. Bailey	1	1
Oath of Benjamin A. Colonna.....	3	2
Petition of Fannie B. Colonna for probate of will.....	4	3
Petition of Alton H. Bailey, infant, for refusal of probate and for letters of administration.....	8	5
Memorandum refusing probate	12	7
Order appointing guardian <i>ad litem</i> for Alton H. Bailey, infant.....	15	8
Answer of Alton H. Bailey by guardian <i>ad litem</i>	16	8
Order denying probate of will and granting letters of administra- tion to Fannie B. Colonna and fixing amount of bond.....	17	9
Order for transcript on appeal	19	10
Certificate of deputy register of wills	20	11

In the Court of Appeals of the District of Columbia.

FANNIE B. COLONNA ET AL., Appellants, }
 vs. } No. 1398.
 EDMUND ALTON ET AL.

1 In the name of God, amen. I, Eileen A. Bailey, of the
city of Washington in the District of Columbia, do make,
publish and declare this and none other my last will and testament,
hereby revoking and making void all wills and testaments by me at
any time heretofore made.

After the payment of my funeral expenses and all my just debts, if any there be, I dispose of all property belonging to me at the time of my death, of every kind whatsoever and wheresoever situate, in the manner and to the several persons hereinafter stated, that is to say:

1. To my daughter Faunie B. Colonna I give and bequeath all my wearing apparel and household goods, together with books, pictures, ornaments and papers, to be disposed of or retained by her for her own use as she may see fit.

2. To my son Lorenzo A. Bailey I give and bequeath in trust the sum of one hundred and fifty dollars (\$150. #) to be applied according to his discretion for the sole use and benefit of his son George Thomas Bailey, and also the further sum of one hundred dollars (\$100. #) to be applied according to his discretion for the sole use and benefit of his daughter Josephine Jayne Bailey.

3. To my daughter in law Kate Wolfe Helmbrecht I give and bequeath in trust the sum of one hundred and fifty dollars (\$150.00) to be applied according to her discretion for the sole use and benefit of her son Alton Horace Bailey.

4. To my daughter Fannie B. Colonna I give and bequeath in trust the sum of one hundred and fifty dollars (\$150. #) to be applied according to her discretion for the sole use and benefit of her daughter Eileen Alton Colonna, and also the further sum of one hundred dollars (\$100. #) to be applied according to her discretion for the sole use and benefit of her son Benjamin A. Colonna, and also the further sum of one hundred dollars (\$100. #) to be applied according to her discretion for the sole use and benefit of her daughter Fannie Bindar Colonna.

5. To my daughter Kathleen Alton Sawyer I give and bequeath in trust the sum of one hundred dollars, (\$100.00) to be applied according to her discretion for the sole use and benefit of her daughter, Helen Sawyer.

6. In the event that my estate shall be insufficient for the payment of all the foregoing pecuniary bequests, I direct that it be applied *pro rata* to their payment.

7. All the residue of my said estate I give, devise and bequeath to my daughters Fannie B. Colonna, Minnie Alton Bailey and Kathleen Alton Sawyer, to be divided among them equally, share and share alike, to have and to hold the same severally to their sole and separate use, their respective heirs, executors, administrators and assigns, respectively, forever.

8. If, for any cause, any of the trustees above mentioned shall fail, refuse or be unable to execute his or her trust aforesaid, I direct that the same in every such case be executed by my executrix or other person administering my estate, and that neither said trustees nor any substituted trustees, nor any of them, shall be required at any time or by any person to account for the moneys so entrusted to them or any part thereof.

9. I hereby appoint my daughter Fannie B. Colonna executrix of this my last will and testament, and I request that no bond or other security be required of her as such executrix.

In testimony whereof I have hereunto set my hand this 30th day of March, in the year of our Lord eighteen hundred and ninety-eight.

EILEEN A. BAILEY.

(Endorsement: Last will and testament of Eileen A. Bailey. Filed Apr. 23, 1903, Louis A. Dent, register of wills, clerk of probate court.)

3

Form No. 1.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit*:

On the 23rd day of April, 1903, came Benjamin A. Colonna and made oath on the Holy Evangelists of Almighty God, that he does not know of any will or codicil of Eileen A. Bailey late of said District, deceased, other than the foregoing instrument of writing dated March 30th 1898; that he received the same from the testatrix shortly after its execution and have had it in *my* custody up to filing it in the office of the register of wills this day; and that said Eileen A. Bailey died on or about the fifteenth day of April, 1903.

BENJAMIN A. COLONNA,
138 "B" Str. N. E.

Sworn to and subscribed before me,

JOHN R. ROUZER,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

(Endorsement: Filed Apr. 23, 1903. Louis A. Dent, register of wills, clerk of probate court.)

4 In the Supreme Court of the District of Columbia, Holding
a Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY, Deceased. Adm.
No. 11753, Dock. No. —.

The petition of Fannie B. Colonna respectfully represents:

1. That the petitioner is a citizen and resident of the District of Columbia and filed this petition in her own right and as the executor named in the paper writing hereinafter referred to.

2. That Eileen A. Bailey, late a citizen of the United States and resident of the District of Columbia, departed this life at the city of Washington in said District on or about the 15th day of April, A. D. 1903.

3. That the said Eileen A. Bailey died possessed of certain personal property consisting of wearing apparel, household goods, books, pictures and ornaments of the value of about \$25.00 money in bank to the amount of about \$87.44, and a certain deed of trust note for \$3500.00 and none other so far as the petitioner is informed and believes.

4. That the said decedent left no real estate.

5. That the said decedent left a certain paper writing bearing date the 30th day of March, 1898, purporting to be her last will and testament, which said paper writing has been filed in the office of the register of wills for the District of Columbia.

6. That the surviving next of kin of said decedent are the petitioner, Minnie Alton Bailey (otherwise known as Mary Margaret Bailey) and Kathleen Alton Sawyer, daughters, all of full age and residents of the District of Columbia, Lorenzo A. Bailey, of the said District, and Edmund Alton, formerly Edmund Alton Bailey, of the city and State of New York, sons, both of full age, and Alton Horace Bailey, a grandchild, an infant of the age of sixteen years, a resident of the city of Denver, State of Colorado.

7. That the said decedent left no debts other than the expenses of her last illness and funeral, amounting to not over \$227.50.

8. That the petitioner is advised that she is entitled to have the said paper writing admitted to probate and record as a will of personal estate and letters testamentary granted her and to that end prays:

1. That the above named next of kin other than the petitioner be cited to appear and show cause, if any they have, against this application.

2. That a guardian *ad litem* for the purposes of these proceedings may be appointed for the said infant Alton Horace Bailey.

4 FANNIE B. COLONNA ET AL. VS. EDMUND ALTON ET AL.

3. That the said paper writing be admitted to probate and record as a will of personal estate and letters testamentary issue unto her.

6 4. That she may have such other and further relief as the premises warrant and to the court shall seem meet.

FANNIE B. COLONNA.

W. C. PRENTISS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, ss:

Fannie B. Colonna being duly sworn says that she has read the foregoing petition by her subscribed and knows the contents thereof; that the matters and things therein stated upon personal knowledge are true and those stated upon information and belief she believes to be true.

FANNIE B. COLONNA.

Subscribed and sworn to before me this 15th day of October, A. D. 1903.

[NOTARIAL SEAL.]

ALBANUS S. T. JOHNSON,
Notary Public.

7

Waiver of Citation.

11753.

We, the undersigned next of kin of Eileen A. Bailey, late of the District of Columbia, being acquainted with the object and purposes of the foregoing and attached petition of Fannie B. Colonna, do hereby waive the issuance and service of any citation or notice by publication upon said petition and consent that the court may pass such order in the premises as may be right and proper, without further notice to us.

MINNIE ALTON BAILEY.
KATHLEEN ALTON SAWYER.
EDMUND ALTON.
LORENZO A. BAILEY.

In presence of—

EVA GLENDENNING MILLS.
IDA SOPHIA SAWYER.
JULIAN BENEDICT.
E. J. TURNER.

(Endorsement: Petition of Fannie B. Colonna for probat- of will and letters testamentary. Filed Oct. 20, 1903, Louis A. Dent, register of wills, D. C. clerk of probate court.)

8 In the Supreme Court of the District of Columbia, Holding a
 Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY, Deceased. Adm.
 No. 11753, Dock. No. 31.

The petition of Alton Horace Bailey, an infant, by Kate Wolfe Helmbrecht, his next friend, respectfully represents:

1. That the petitioner is an infant of the age of sixteen years, a citizen of the United States and resident of the city of Denver, in the State of Colorado, and files this petition in his own right, by his next friend.

2. That Eileen A. Bailey, late a citizen of the United States and resident of the District of Columbia, departed this life at the city of Washington in said District on or about the 15th day of April, A. D. 1903.

3. That the said Eileen A. Bailey died possessed of certain personal property consisting of wearing apparel, household goods, books, pictures and ornaments of the value of about \$25.00 / 100 money in bank to the amount of about \$87.44 / 100, and a certain deed of trust note for \$3500.00 / 100 and none other so far as the petitioner is informed and believes.

4. That the said decedent left no real estate, and no debts
9 as petitioner is informed and believes, other than the expenses of her last illness and funeral amounting to not over \$227.50.

5. That the said decedent left a certain paper writing bearing date the 30th day of March, 1898, purporting to be her last will and testament, which said paper writing has been filed in the office of the register of wills for the District of Columbia. That the said paper writing, however, does not bear the signatures of any attesting witnesses and the petitioner is advised and, therefore, avers that the same is of no effect as a last will and testament for any purpose and is not entitled to probate and record.

6. That the surviving next of kin of said decedent are Fannie B. Colonna, Minnie Alton Bailey (otherwise known as Mary Margaret Bailey) and Kathleen Alton Sawyer, daughters, all of full age and residents of the District of Columbia, Lorenzo A. Bailey, of the said District, and Edmund Alton, formerly Edmund Alton Bailey, of the city and State of New York, sons, both of full age, and the petitioner, a grandchild.

7. That the petitioner is advised that he is entitled to have probate and record of the said paper writing refused by the court and letters of administration upon the estate of the said decedent granted to some proper person and to that end prays:

10 1. That the above named next of kin other than the petitioner be cited to appear and show cause, if any they have, against this application.

2. That the said paper writing may be refused probate and record and letters of administration upon the estate of said decedent as intestate granted to some proper person.

3. That he may have such other and further relief as the premises warrant and to the court shall seem meet.

ALTON HORACE BAILEY,
By KATE WOLFE HELMBRECHT,
His Next Friend.

STATE OF COLORADO, }
City and County of Denver, } ss:

Kate Wolfe Helmbrecht, being duly sworn says that she has read the foregoing petition by her subscribed, as the next friend of Alton Horace Bailey, infant, and knows the contents thereof; that the matters and things therein stated upon personal knowledge are true and those stated upon information and belief she believes to be true.

Subscribed and sworn to before me this 10th day of October A. D. 1903.

[NOTARIAL SEAL.]

BERNHARD BENIMA,
Notary Public.

(My commission expires December 2nd, 1906.)

11

Waiver of Citation.

We, the undersigned next of kin of Eileen A. Bailey, late of the District of Columbia, being acquainted with the object and purposes of the foregoing and attached petition of Alton Horace Bailey, by his next friend, do hereby waive the issuance and service of any citation or notice by publication upon said petition.

MINNIE ALTON BAILEY.
KATHLEEN ALTON SAWYER.
EDMUND ALTON.
LORENZO A. BAILEY.

In the presence of

EVA GLENDENNING MILLS.
WELLS M. SAWYER.
JULIAN BENEDICT.
E. J. TURNER.

(Endorsement: Petition of Alton Horace Bailey infant for refusal of probat- & for letters of adm. to issue. Filed Oct. 20, 1903, Louis A. Dent, register of wills, D. C. clerk of probate court.)

12 *In re* the Application for Probate of the Will of EILEEN A. BAILEY.

Eileen A. Bailey died upon Ap'l 15 / 03: tendered for probate is a paper signed by her, but without the attestation or subscription of any witness.

At the time of her death the law of her domicile (Code sec. 1626) amongst other things provided,

"All wills * * * shall be attested and subscribed * * * by at least two credible witnesses or else they shall be utterly void and of no effect." * * *

Contended:—That this will need not comply with the requirements of attestation and subscription because it happened to have been signed before the enactment of the code.

All will-making is dependent upon statutory creation of the right: the Congress or legislature can, if it chooses, abrogate it entirely.

Had the enactment been, "all wills shall be utterly void and of no effect," then effectual will-making would have been altogether abrogated, and no will of any person then alive, could at his death turn out to be effectual, no matter whether executed prior or subsequent to the legislation: the effect of the existing statute is to render "all wills void" except such as be executed in a particular manner of attestation and subscription: such was the quite evident intention of Congress.

13 In making it requisite to the validity of a will that there be attesting witnesses who shall subscribe their names to the writing, the law has in view a three-fold purpose:

1. The identification of the paper.
2. To protect testators against fraud.
3. The ascertainment of testamentary capacity.

These several reasons each direct themselves with equal force against papers signed prior, as against those signed subsequent to the enactment: By comprehending the purposes of the law, the subjects to which it should apply stand revealed with fair degree of clearness.

No paper is anything at all as a will, until the death of the testator; and by refusing unattested papers priorly signed, there is no giving of retrospective operation to the statute, for upon the point of valid execution the law looks back no further than to the time of death; and whether at that moment there existed a will, depends upon the requirements of the law at that very time, respecting validity; respecting what, if anything, the decedent left behind, to speak her purposes of testamentary disposition. The paper tendered at bar

fails of essential requirements and its admission to probate must be denied.

WRIGHT.

See—Dupuy *vs.* Wurtz 53 N. Y. 556.

Moultrie *vs.* Hunt 23 N. Y. 394.

Giddings *vs.* Turgeon 58 Vt. 106.

Elcock's will 4 McCoed star page 39.

14 Sutton *vs.* Chenault 18 Ga. 1.

Wakefield *vs.* Phelps 37 N. H. 295.

Westlake Priv. Int. Law 1st ed. p. 310 s. 328.

Dacey Conflict of Laws p. 700 "Exception."

1 Red. Wills 3d ed. star p. 406 # 30 a 17.

1 Woerner Adm. star p. 72 # 40.

Minor Conflict Laws #143.

(Endorsement: Mem. refusing probate. Filed Jan. 7, 1904. Louis A. Dent, register of wills, D. C. clerk of probate court.)

15 In the Supreme Court of the District of Columbia, Holding
a Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY, Deceased.

Upon consideration of the proceedings in the above entitled cause, it is by the court this 13th day of January, 1904, ordered that Edmund Brady be and he is hereby appointed guardian *ad litem* for Alton Horace Bailey, an infant next of kin and heir-at-law of the said Eileen A. Bailey for the purposes of these proceedings.

WRIGHT, *Justice.*

(Endorsement: Order appointing guardian *ad litem* for Alton Horace Bailey, infant. Filed Jan. 13, 1904, Louis A. Dent, register of wills, D. C., clerk of probate court.)

16 In the Supreme Court of the District of Columbia, Holding
a Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY, Deceased. Adm.
No. 11,753, Doc. 31.

The answer of Alton Horace Bailey, infant, to the petition of Fannie B. Colonna filed in the above-entitled cause.

The said infant by his guardian *ad litem* answering says that he is of tender years and referring to his petition filed in said cause by Kate Wolfe Helmbrecht, his mother, as his next friend, prays that the same may be taken and considered as his answer to the

said petition of Fannie B. Colonna, and submits his interests in the premises to the care and protection of the court.

By EDMUND BRADY,
Guardian ad Litem.

DISTRICT OF COLUMBIA, ss :

Edmund Brady, being duly sworn says that he has read the foregoing answer by him subscribed as guardian *ad litem* of said Alton Horace Bailey and knows the contents thereof; and that the matters therein stated upon personal knowledge are true and those stated upon information and belief he believes to be true.

EDMUND BRADY.

Subscribed and sworn to before me this 15th day of January, A. D. 1904.

JOHN R. ROUZER,
Deputy Register.

(Endorsement: Answer of infant Alton Horace Bailey by g'd'n *ad litem*. Filed Jan. 15, 1904, Louis A. Dent, register of wills, D. C. clerk of probate court.)

17 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY, Deceased. Adm. No. 11753, Doc. 31.

Upon consideration of the petition of Fannie B. Colonna praying the admission to probate and record of a certain paper writing bearing date the 30th day of March, 1898, and purporting to be the last will and testament of said Eileen A. Bailey, and the petition of Alton Horace Bailey, by Kate Wolf Helmbrecht, his next friend, praying that probate and record of said paper writing be refused because the same does not bear the signature of two subscribing witnesses as required by the Code of Law for the District of Columbia in force at the time of the death of said Eileen A. Bailey, and that letters of administration upon the estate of said decedent may issue as in case of intestacy, and it being shown by the oath of a competent witness that the said paper writing bears the genuine signature of the said decedent, but it appearing to the court that said paper writing is not attested and subscribed by two witnesses and the court being of opinion that the validity of said paper writing, as a last will and testament, is governed by the provisions of section 1626 of the said Code of Law for the District of Columbia, and that by reason of such lack of attestating and subscribing witnesses the said paper writing cannot be admitted to probate and

record, it is this 15th day of January, A. D. 1904, by the court ordered and adjudged that the prayers of the petition of the said Fannie B.

Colonna be denied and that the prayers of the petition of said
18 Alton Horace Bailey, by his next friend be granted; that the said paper writing of March 30, 1898, be and the same is hereby refused probate and record and that letters of administration upon the estate of said Eileen A. Bailey as in case of intestacy, be granted unto the said Fannie B. Colonna upon her giving bond in the penal sum of five thousand dollars conditioned as required by law.

And from this order and judgment of the court refusing probate and record of said paper writing as the last will and testament of the said Eileen A. Bailey and granting letters of administration upon the estate of said decedent as in case of intestacy, the said Fannie B. Colonna, as executrix and legatee, and Lorenzo A. Bailey, Kathleen Alton Sawyer and Minnie Alton Bailey, as legatees, named in said paper writing, appeal in open court, and it is further ordered that the penalty of the bond for costs on appeal to be given by such appellants be and the same is fixed at fifty dollars.

WRIGHT, *Justice*.

(Endorsement: Order denying probate of will and granting letters of administration to Fannie B. Colonna. Bond \$5000. Appeal in open court. Filed Jan. 15, 1904. Louis A. Dent, register of wills, D. C. clerk of probate court.)

19 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In the Matter of the Estate of EILEEN A. BAILEY. Adm. No. 11753.

The register of wills will please prepare transcript of the record on appeal and include therein

Copy of the testamentary paper offered for probate with affidavit of Benj. A. Colonna.

Petition of Alton Horace Bailey infant, & waiver of citation

Petition of Fannie B. Colonna & waiver of citation

Order appointing guardian *ad litem* for infant

Answer of infant by guardian *ad litem*.

Order refusing probate etc.

Opinion of court.

Note of filing of bond.

W. C. PRENTISS,
Att'y for Appellants.

(Endorsement: Order for transcript of record on appeal. Filed Jan. 18, 1904, Louis A. Dent, register of wills, D. C. clerk of probate court.)

20

Form No. 94.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit* :

I, John R. Rouzer, deputy register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 19, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 11753 estate of Eileen A. Bailey, deceased, wherein Fannie B. Colonna, Lorenzo A. Bailey, Kathleen Alton Sawyer and Minnie Alton Bailey are appellants, and Edmund Alton and Alton Horace Bailey are appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of fifty dollars, was duly filed by said appellants, and approved by said court on the 18th day of January A. D. 1904.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said probate court, this twentieth day of January, A. D. 1904.

{ Seal Supreme Court of the District of Columbia, }
 { Probate Jurisdiction. }

JOHN R. ROUZER,
*Deputy Register of Wills for the District
 of Columbia, Clerk of the Probate Court.*

Endorsed on cover: District of Columbia supreme court. No. 1398. Fannie B. Colonna *et al.*, appellants, *vs.* Edmund Alton *et al.* Court of Appeals, District of Columbia. Filed Jan. 22, 1904. Henry W. Hodges, clerk.